SUPREME COURT, U. S.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 389

MRS. AGNES JUNE DILLARD,
Petitioner

vs.

JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.,
Defendant,

Petition For Writ of Certiorari to the Court of Appeals of Georgia

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Petitioner in Certiorari,

vs.

JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.,
Defendant in Certiorari.

PETITION OF MRS. AGNES JUNE DILLARD FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA, AND DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Mrs. Agnes June Dillard files this her petition for writ of certiorari to the Court of Appeals of Georgia, for the purpose of having reviewed, corrected, and reversed, the decision and judgmnt of that Court of March 15, 1962 as revised on March 29, 1962, affirming the judgment of the Superior Court of Fulton County, Georgia, in the claim

Case No 80648 of Jackson's Atlanta Ready Mix Concrete Co, Inc. vs Mrs Dillard as Plaintiff in Fi Fa in

Case No. A-74798 as entered on October 12, 1961 overruling ~~Company, Inc. vs. Mr. Dillard, as Plaintiff in Fi. Fa. in Case No. A-74978 as entered on October 12, 1961 overruling~~ and denying her motion as amended for judgment in her favor notwithstanding the verdict for said Claimant. Application for certiorari was duly made to the Supreme Court of Georgia. This application was denied by the Supreme Court of Georgia, without an opinion, on May 21, 1962. Petitioner duly filed with the Supreme Court of Georgia on May 30, 1962, a motion for reconsideration of the denial of her petition for certiorari, and on June 4, 1962 filed a supplement to or condensation of said motion with said court. They were denied by the Supreme Court of Georgia on June 5, 1962.

The Court of Appeals of Georgia is, therefore, the highest Court of this State in which a decision in this case could be had.

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The decision of the Court of Appeals of Georgia sought to be reviewed was rendered by that Court on March 15, 1962 as revised on March 29, 1962. It appears in 105 Ga. App. Reports on pages 607-14, and in the accompanying record at page 61. The motion of Petitioner for a rehearing was denied by the Court of Appeals of Georgia on March 29, 1962 and entered the same date. (R. 103).

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Section 1257 (3) of Title 28 U.S.C.A., reading in part as follows: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

*** (3) By writ of certiorari, *** Where any title, right, privilege or immunity is specially set up or claimed under the Constitution *** of *** the United States."

THE QUESTION PRESENTED FOR REVIEW

The decision of the Court of Appeals of Georgia deprives Petitioner, a citizen of Georgia and of the United States, of her property in the amount ($21,816.00) of her verdict, judgment, and fi. fa., without due process of law and without equal protection of the law, in violation of Section I of the 14th Amendment of the U. S. Constitution, in that the law of Georgia as applied to other persons in like circumstances and similar situations provides that a judgment against a person (natural or artificial) in his or its assumed or trade name is valid and binding, and that such a person is a party to the judgment and is not entitled to file a claim to property levied upon to satisfy the judgment.

CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

In a suit for bodily injuries, Mrs. Agnes June Dillard recovered a verdict and judgment on Oct. 9, 1959, in the amount of $21,816.00 against a corporation listed in the Atlanta Telephone Directory and the Atlanta City Directory as "Jackson Ready Mix Concrete Co. Inc.," 1000 Seaboard Avenue, N.E., Atlanta, Georgia. Its correct corporate name was "Jackson's Atlanta Ready Mix Concrete Company, Inc." The public record of its charter does not identify it with said address.

The action was against said corporation and the driver of one of its cement-mixing trucks, the negligent operation of which caused Mrs. Dillard's injuries. Both Defendants

were served with the suit and process at 1000 Seaboard Avenue, but neither appeared nor answered. The jury's verdict for Mrs. Dillard is based upon proof submitted by her showing the extent, severity, and permanency of her injuries. The Plaintiff was injured on May 28, 1959 by the Defendants, *and the Georgia Statute of Limitations for this tort is two years.*

Immediately following the entry of said verdict and judgment, the corporate defendant interposed numerous motions and proceedings attacking the sufficiency of the service of process and the conclusiveness of the judgment, and in all of said motions and proceedings the corporation designated itself as *"apparently one of the defendants"* in the above stated suit and judgment. On May 31, 1960 the Sheriff of Fulton County, Georgia levied upon the property of the corporate defendant to satisfy Mrs. Dillard's execution. The Sheriff made the following entry of his levy: *"The said property is levied upon as the property of Jackson's Atlanta Ready Mix Concrete Company, Inc., doing business under the assumed trade or business name of Jackson Ready Mix Concrete Co. Inc. at 1000 Seaboard Avenue, N. E., Atlanta, Georgia, as Defendant in fi. fa: issued from Fulton Superior Court against Jackson Ready Mix Concrete Co. Inc. et al in favor of Mrs. Agnes June Dillard as Plaintiff in fi. fa. Property pointed out by plaintiff's attorney."*

The corporate Defendant thereupon filed a *"Third-Party Claim"* to the property so levied upon, although there were still pending the motions and proceedings which it had filed attacking the sufficiency of the service and the conclusiveness of the judgment. In dismissing one of said motions on June 20, 1960, it stipulated as follows: *"Jackson's Atlanta Ready Mix Concrete Company, after levy*

made, having filed third-party claim in the within matter, the above traverse (of the service of process upon it) is hereby withdrawn and dismissed."

Thereafter the Defendant's claim case came on for trial before Fulton Superior Court and a jury. In addition to the foregoing stipulation and admissions in judicio of the Defendant, the evidence adduced on the trial included, among other things: 1. Claimant's stipulation that one of its employees, E. H. Lambert, had been served with the suit and process on July 27, 1959 at 1000 Seaboard Avenue, (R. 47-8). 2. The production in court and in evidence by Claimant of the copy of the suit and process served upon its said employee, E. H. Lambert, (R. 47-8 and 54). 3. Its stipulation that said copy of the suit and process was the very one served upon its said employee, E. H. Lambert, (R. 47-8 and 54). 4. That its co-defendant, Robert R. Stephens, and the driver of the truck which injured Plaintiff, was on the payroll of Jackson's Atlanta Ready Mix Concrete Company, Inc. at the time of the collision, (R. 43). 5. Admission of H. N. Jackson, Jr., General Manager of the Defendant Corporation, that the truck which injured Mrs. Dillard was its property and that the cement-mixer thereon had been dismounted therefrom. (R. 28).

Upon the completion of the evidence in the claim case of Jackson's Atlanta Ready Mix Concrete Company, Inc., Mrs. Dillard's counsel moved for a directed verdict in her behalf upon the ground that *the positive and uncontradicted evidence and the solemn admissions in judicio of said claimant corporation showed it was the same legal entity and party as the Defendant in fi. fa.* (R. 4-5). Said motion was denied by the Court. The case was then submitted to the Jury, after argument of counsel and charge of the court,

and the Jury returned a verdict for Jackson's Atlanta Ready Mix Concrete Company, Inc. as Claimant. (R. 5, 18).

Mrs. Dillard thereupon moved for a judgment in her behalf non obstante verdicto for Claimant. (R. 19-30). Said motion was denied and Mrs. Dillard appealed therefrom to the Court of Appeals of Georgia, which affirmed the trial court. (R. 4-12).

Mrs. Dillard filed a motion for rehearing upon the ground that the decision of the Court of Appeals deprived her, a citizen of Georgia and of the United States of her property in the amount of her verdict, judgment, and fi. fa., without due process of law and without equal protection of the law, in violation of Section I of the 14th Amendment of the U. S. Constitution, in that the law of Georgia as applied to other persons in like circumstances and similar situations provides that a judgment against a person (natural or artificial) in his or its assumed or trade name is valid and binding, and that such a person is a party to the judgment, and is not entitled to file a claim to property levied upon to satisfy the judgment. (R. 68).

Plaintiff filed a petition with the Supreme Court of Georgia for a writ of certiorari to review, correct, and reverse the erroneous decision of the Court of Appeals upon the same grounds urged in Plaintiff's motion for rehearing in the latter court. (R. 104). It was denied. (R. 105). Plaintiff also filed in the Supreme Court of Georgia, a motion for reconsideration of the denial of her petition for certiorari to the Court of Appeals, and it was likewise denied. (Certificate of Clerk of Supreme Court attached.)

Plaintiff is now filing this petition to the Supreme Court of the United States for the writ of certiorari to review, correct, and reverse the decision and judgment of the Court

of Appeals of Georgia of March 15, 1962 as revised on March 29, 1962 and its denial on the latter date of Petitioner's motion for rehearing.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

The question involved in this petition for certiorari is substantial and of gravity and importance in that the decision of the Court of Appeals of Georgia of March 15, 1962 is ARBITRARY AND CAPRICIOUS and deprives Plaintiff, a citizen of Georgia and of the United States, of her property to the extent of the amount ($21,816.00) of her final, valid, and conclusive judgment against Jackson's Atlanta Ready Mix Concrete Company, Inc. in its assumed or trade name and the execution based thereon, without due process of law and without equal protection of the law, in violation of Section I of the 14th Amendment of the U. S. Constitution in the particulars specified in this petition.

Because the two year statute of limitations as to the tort in this case has expired, the decision of the Court of Appeals of Georgia of March 15th as revised on March 29, 1962 (unless reversed upon certiorari by this Court) will forever bar Plaintiff from receiving any compensation whatever from Defendant Jackson's Atlanta Ready Mix Concrete Company, Inc. (masquerading as a third-party claimant) for the serious, painful, disabling, and permanent injuries negligently inflicted upon her by its employee, Robert R. Stephens, on May 28, 1959 while operating its truck in its business, despite the fact that the said corporation was served with suit and process by leaving a copy with its agent or manager, E. H. Lambert, at its place of business at 1000 Seaboard Avenue, N.E., Atlanta, Georgia and it had full opportunity to appear, plead, and defend against

said suit, but failed to do so, and Petitioner obtained, upon proper proof, a valid and binding verdict and judgment against it in its trade name of Jackson Ready Mix Concrete Co. Inc. in the amount of $21,816.00 on October 6, 1959.

To paraphrase the language of the U. S. Supreme Court in *U. S.* vs. *Lee*, 106 U.S. 196, 1 S.Ct. at page 261, IT CANNOT BE, THEN, THAT WHEN IN A SUIT BY ONE PARTY AGAINST ANOTHER PARTY FOR COMPENSATION FOR INJURIES NEGLIGENTLY INFLICTED UPON THE FORMER BY THE LATTER, WHEN THE INJURED PARTY HAS ESTABLISHED HER RIGHT TO COMPENSATION ACCORDING TO ALL THE FORMS OF JUDICIAL PROCEDURE, AND BY THE VERDICT OF A JURY AND A JUDGMENT OF THE COURT AGAINST THE PARTY WHICH NEGLIGENTLY HURT HER AND IN THE NAME UNDER WHICH IT WAS DOING BUSINESS AND WAS DULY AND LEGALLY SERVED, THE INJURED PARTY CAN BE ARBITRARILY AND ILLEGALLY DEPRIVED OF THE COMPENSATION AWARDED TO HER BY THE VERDICT OF THE JURY AND THE JUDGMENT OF THE COURT MERELY BECAUSE THE PARTY WHICH SERIOUSLY INJURED AND DAMAGED HER NEGLECTED TO FILE AN ANSWER TO THE SUIT AND PROCESS DULY AND LEGALLY SERVED UPON IT; THAT, THOUGH THE NATURE OF THE CONTROVERSY IS ONE PECULIARLY APPROPRIATE TO THE JUDICIAL FUNCTION OF THE COURT IN WHICH SHE OBTAINED HER VERDICT AND JUDGMENT AFTER A FAIR AND LEGAL TRIAL. "IF SUCH BE THE LAW OF THIS COUNTRY, IT

SANCTIONS A TYRANNY WHICH HAS NO EXISTENCE IN THE MONARCHIES OF EUROPE, NOR IN ANY OTHER GOVERMENT WHICH HAS A JUST CLAIM TO WELL-REGULATED LIBERTY AND THE PROTECTION OF PERSONAL RIGHTS."

Article I, Section 1, Paragraph 2 of the Georgia Constitution provides that, "Protection to person and property is the paramount duty of government, and shall be impartial and complete."

Article I, Section 1, paragraph 3 of the Georgia Constitution provides that, "No person shall be deprived of life, liberty, or property except by due process of law."

Article XII, Section 1, paragraph 3 of the Georgia Constitution adopted in 1945 provides that in subordination to the U. S. Constitution and the said constitution of Georgia, "All laws now of force in this State, not inconsistent with the constitution, shall remain of force until the same are modified or repealed by the General Assembly."

The record in this case shows without contradiction that under the uniform decisions of the Court of Appeals and the Supreme Court of Georgia, including *Becker* vs. *Truitt,* 39 Ga. App. 286, 146 S.E. 654; *Becker* vs. *Truitt,* 170 Ga. 757, 154 S.E. 262; *Executive Committee of the Baptist Convention of Georgia* vs. *Smith,* 44 Ga. App. 184, 161 S.E. 143; *Eslinger* vs. *Herndon,* 158 Ga. 823, 124 S.E. 169; and *Smith* vs. *Hartrampf,* 105 Ga. App. 40, 123 S.E. 2nd 417, Plaintiff has a valid, binding, and final judgment against Jackson's Atlanta Ready Mix Concrete Company, Inc. in its assumed or trade name of Jackson Ready Mix Concrete Co. Inc. (R. 49). The record also shows without contradiction that the execution based on said valid

and final judgment was levied upon Jackson's Atlanta Ready Mix Concrete Company, Inc. doing business under the assumed or trade name of Jackson Ready Mix Concrete Co. Inc. at 1000 Seaboard Avenue, and that the verdict and judgment for Jackson's Atlanta Ready Mix Concrete Company, Inc. as a third-party claimant of property levied upon is without any evidence whatsoever to support it and contrary to the positive, uncontradicted, and overwhelming evidence *as well as the solemn admissions in judico of said corporation and its officers.*

The said decisions of the Court of Appeals and the Supreme Court of Georgia have been applied to all other persons in like circumstances and similar situations and THEY HOLD THAT A JUDGMENT RENDERED AGAINST A PERSON (NATURAL OR ARTIFICIAL) IN HIS OR ITS ASSUMED OR TRADE NAME IS NOT VOID BUT IS VALID AND BINDING, AND THAT SUCH A PERSON IS A PARTY TO THE JUDGMENT AND IS NOT ENTITLED TO FILE A CLAIM TO THE PROPERTY LEVIED UPON TO SATISFY THE JUDGMENT AND EXECUTION BASED THEREON. NONE OF SAID DECISIONS HAS EVER BEEN MODIFIED OR REPEALED BY THE GENERAL ASSEMBLY OF GEORGIA OR CRITICIZED OR MODIFIED OR REVERSED BY THE APPELLATE COURTS OF GEORGIA.

The Defendant and Claimant, Jackson's Atlanta Ready Mix Concrete Company, Inc., filed motion to set aside the judgment of Petitioner against Jackson Ready Mix Concrete Co. Inc. in Case No. A-74798, in which it stated itself as the defendant and said it was "herein referred to as Jackson's Ready Mix Concrete Co. Inc., one of the defendants

in said matter." AND EXPRESSLY DESIGNATED ITSELF SEVEN TIMES AS THE DEFENDANT. (R. 58) This pleading of Jackson's Atlanta Ready Mix Concrete Company, Inc. constitutes A SOLEMN ADMISSION IN JUDICIO THAT IT IS THE SAME PARTY OR LEGAL ENTITY AS JACKSON READY MIX CONCRETE CO. INC., THE DEFENDANT IN EXECUTION, AND SAID PLEADING HAS NEVER BEEN DISMISSED OR WITHDRAWN. In the case of *Florida Yellow Pine Company et al* vs. *Flint River Naval-Stores*, 140 Ga. 321, 78 S.E. 900, the Supreme Court of Georgia held that a party to a suit will not be allowed to disprove an admission made in his or its pleadings, without withdrawing the same from the record. That case cited *Pinkham* vs. *Gibbs*, 108 Ga. 141, 33 S.E. 945, holding that admissions in a sworn pleading and admissions on the witness stand are both in judicio and cannot be withdrawn so as to deprive the other party of the benefit of them, and that a party voluntarily making the admissions should be bound by them, although he may strike them from the pleading by amendment.

In addition to filing a motion to set aside the judgment in the suit of Mrs. Dillard for damages in Case No. A-74798, Jackson's Atlanta Ready Mix Concrete Company filed two traverses of service in which it referred to itself as the defendant in execution (R. 50-2, 55-7). It also filed in a separate case under No. A-80327, an affidavit of illegality in which it again designated itself as the defendant in execution. (R. 8, 72).

Jackson's Atlanta Ready Mix Concrete Company, Inc. was not listed in its correct corporate name in either the telephone directory or the city directory, and its corporate charter did not identify it in any way with its place of business at 1000 Seaboard Avenue, N.E., Atlanta, Georgia.

but stated its address as 450 South Central Avenue, Hapeville, Georgia. Its truck which injured Petitioner was driven by its employee, Stephens, from 1000 Seaboard Avenue, Atlanta, Georgia, into the car occupied by her. The Defendant led Petitioner to sue it in its assumed or trade name of Jackson Ready Mix Concrete Co. Inc. by designating itself in its accident report to the Atlanta Police Department, to the Georgia State Public Safety Department, and on the trial of the charge against its truck driver in Atlanta Traffic Court, as Jackson Ready Mix Concrete Co. Inc., and by having said trade name listed in both the alphabetical and classified sections of the Atlanta Telephone Directory at its place of business, 1000 Seaboard Avenue, N.E. UNDER A WRITTEN CONTRACT WITH THE TELEPHONE COMPANY SIGNED BY ITS PRESIDENT, A. P. JACKSON. (R. 60).

In the case of *Moody and Wife* vs. *Davis,* 10 Ga. 410-12, the Supreme Court of Georgia held in part as follows: "THE MANDATE RESTRAINS THE JUDGE FROM GOING BEYOND OR OUTSIDE THE LAW, AND ENJOINS HIM TO ENFORCE THE LAW. HE SHALL IN HIS DISCRETION MAKE NO NEW LAW, AND HE SHALL, WITHOUT DISCRETION, GIVE EFFECT TO THE LAWS THAT ARE OF FORCE; AND THIS WE UNDERSTAND TO BE THE DUTY OF A JUDGE IN GEORGIA ***. IT IS THE DUTY OF THE JUDGE TO ENFORCE THE LAWS OF THE STATE, MADE IN ACCORDANCE WITH THE STATE AND FEDERAL CONSTITUTIONS—THE WHOLE LAW, AS IT APPLIES, IN HIS JUDGMENT, TO THE CASES WHICH COME BEFORE HIM. HE HAS NO RIGHT AND NO POWER TO WITHHOLD THE APPLICATION OF ONE SINGLE PRINCIPLE OF LAW

TO A SINGLE CASE OVER WHICH HE HAS JURISDICTION; HE HAS NO DISPENSATION JUSTIFYING OR EXCUSING AN OMISSION TO APPLY THE LAW. ***"

In an address by Mr. Chief Justice Warren at Williamsburg, Virginia on Sept. 25, 1954, commemorating the 200th birthday of the late Chief Justice John Marshall, he stated in part as follows: "As Americans we are proud of our system of government and our standards of justice. *** As a nation we make no pretense except to A PASSION FOR JUSTICE BASED UPON the dignity and RIGHTS OF THE INDIVIDUAL. *** WE BELIEVE THIS KIND OF JUSTICE IS THE RIGHTFFUL HERITAGE OF EVERY HUMAN BEING AND THAT IT IS HIS RIGHT AND DUTY TO ACHIEVE IT. *** For three and a half centuries, Americans, using the experience and wisdom of older countries from which we or our forbears came, have endeavored to develop in this section of the world, a system of government and a body of law WHICH WILL ACCORD JUSTICE TO EVERYONE ***. At times we have been close to failure, but we have never failed in our climb toward the pinnacle of true justice, and we are climbing today to meet the test of Thomas Jefferson that 'THE MOST SACRET OF THE DUTIES OF GOVERNMENT IS TO DO EQUAL AND IMPARTIAL JUSTICE TO ALL ITS CITIZENS.'"

A MERE READING OF THE STATEMENT OF THIS CASE WILL SHOW THAT PETITIONER HAS BEEN DEPRIVED OF THAT "EQUAL AND IMPARTIAL JUSTICE" AND "RIGHTFUL HERITAGE OF EVERY HUMAN BEING" REFERRED TO BY MR. CHIEF JUSTICE WARREN IN HIS ADDRESS.

In the case of *Abie State Bank* vs. *Weaver*, 282 U.S. 765,

51 S. Ct. 252, this Court held that where a Federal Question is presented in a case appealed from State Court, as well as a non-Federal question, it must be determined whether the non-Federal ground independently supports the judgment.

It is apparent from the record in this case that the Court of Appeals of Georgia ignored the Federal Constitutional Question properly raised by Petitioner and adopted its erroneous view of a non-Federal question in order to evade a decision of said Federal Question. In this connection, attention is invited to the fact that Georgia Code Section 6-1607 expressly provides that the Court of Appeals of Georgia shall decide every question made by a specific assignment of error in the bill of exceptions, and Georgia Code Section 6-1606 provides that such a decision shall be announced by a written synopsis of the points decided. Attention is also again invited to the decision of the Supreme Court of Georgia in *Moody and Wife* vs. *Davis*, 10 Ga. 410-12, holding that it is the duty of a Judge in Georgia to enforce the laws of the State, made in accordance with the State and Federal Constitutions—the whole law, as it applies in his judgment, to the cases which come before him, and that he has no right and no power to withhold the application of one single principle of law to a single case over which he has jurisdiction.

Georgia Code Section 110-104 provides that, "Where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, shall demand a particular verdict, the court may direct the jury to find for the party entitled thereto." Georgia Code Section 110-113 provides, "Whenever a motion for a directed verdict, made at the close of all the evidence is denied, or for any reason is not granted, the party who has moved for a directed verdict, within thirty days after the reception of

the verdict, may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. ***"

The following decisions of the U. S. Supreme Court also strongly support Petitioner's constitutional right to the grant of the writ of certiorari under the positive and uncontradicted evidence and the solemn admissions in judicio of Defendant in this case and Section I of the 14th Amendment of the U. S. Constitution: *U. S.* vs. *Dixon*, 40 U.S. 141; *Hague* vs. *Committee For Industrial Organization*, 59 S. Ct. 954, 307 U.S. 496; *Williams* vs. *Kaiser*, 65 S. Ct. 363, 323 U.S. 471; *Abie State Bank* vs. *Weaver*, 282 U.S. 765, 51 S. Ct. 252; *Brooklyn Savings Bank* vs. *O'Neill, Etc.*, 324 U.S. 697, 65 S. Ct. 895; *Oyama* vs. *State of California*, 332 U.S. 633, 68 S. Ct. 269; *Angel* vs. *Bullington*, 67 S. Ct. 657, 330 U.S. 183; *Demorest* vs. *City Bank Farmers Trust Company*, 64 S. Ct. 384, 321 U.S. 36; *U. S.* vs. *Pink*, 62 S. Ct. 552, 315 U.S. 203; *Great Northern Ruy. Co.* vs. *State of Washington*, 57 S. Ct. 397, 300 U.S. 154; *Lawrence* vs. *State Tax Commission of Mississippi*, 52 S. Ct. 556, 286 U.S. 276; *Craig* vs. *Harney*, 67 S. Ct. 1249, 331 U.S. 367; *Wolfe* vs. *State of N. C.*, 80 S. Ct. 1482, 364 U.S. 177; *Kern-Limerick* vs. *Scurlock, Etc.*, 74 S. Ct. 403, 347 U.S. 110; *N.A.A.C.P.* vs. *Alabama*, 78 S. Ct. 1163, 357 U.S. 449; *Napue* vs. *People of Illinois*, 79 S. Ct. 1173, 360 U.S. 264.

The equal protection of laws is a pledge of the protection of equal laws. *State of Missouri, ex rel Gaines* vs. *Canada et al*, 305 U.S. 357 (7), 59 S. Ct. 232, 356.

EQUAL PROTECTION OF THE LAW IS SOMETHING MORE THAN AN ABSTRACT RIGHT. IT IS A COMMAND WHICH THE STATE MUST RESPECT—THE BENEFIT OF WHICH EVERY PERSON MAY DEMAND. *Hill* vs. *State of Texas*, 316 U.S.

400, 62 S. Ct. 1159.

In the case of *Shelley et ux* vs. *Kraemer et ux,* 334 U.S. 1, 68 S. Ct. 836, this Court held that State action in violation of the 14th Amendment is equally repugnant to the constitutional commands whether directed by State Statute OR TAKEN BY A JUDICIAL OFFICIAL in the absence of statute, AND THAT WHERE IT IS CLEAR THAT ACTION OF STATE VIOLATES TERMS OF THE FEDERAL CONSTITUTION, IT IS THE OBLIGATION OF THE U. S. SUPREME COURT SO TO DECLARE.

In the case of *Malinski et al* vs. *People of State of New York,* 324 U.S. 401, 65 S. Ct. 781, this Court held:

> "Judicial review of the guaranty of due process imposes on the Federal Supreme Court an exercise of judgment upon the whole course of proceedings to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people ***."

Section I of the 14th Amendment of the U. S. Constitution expressly provides that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the law."

In construing the U. S. Constitution, the U. S. Supreme Court in the case of *Chambers* vs. *State of Florida,* 60 S. Ct. 472, 309 U.S. 227, Stated:

> "UNDER OUR CONSTITUTIONAL SYSTEM, THE COURTS STAND AGAINST ANY WINDS THAT BLOW AS HAVENS OF REFUGE TO THOSE WHO MIGHT OTHERWISE SUFFER BECAUSE THEY ARE HELPLESS, WEAK, OUT-

NUMBERED, OR BECAUSE THEY ARE NON-CONFORMING VICTIMS OF PREJUDICE AND PUBLIC EXCITEMENT. *** NO HIGHER DUTY, AND NO MORE SOLEMN RESPONSIBILITY RESTS UPON THIS COURT, THAN THAT OF TRANSLATING INTO LIVING LAW AND MAINTAINING THIS CONSTITUTIONAL SHIELD DELIBERATELY PLANNED AND INSCRIBED FOR THE BENEFIT OF EVERY HUMAN BEING SUBJECT TO OUR CONSTITUTION—OF WHATEVER RACE, CREED, OR PERSUASION." (Capitals added.)

In the noted case of *Yick Wo* vs. *Hopkins, Sheriff,* 118 U.S. 356, 6 S. Ct. 1064, this Court held in part as follows:

"*** THE VERY IDEA THAT ONE MAY BE COMPELLED TO HOLD HIS LIFE, OR THE MEANS OF LIVING, OR ANY MATERIAL RIGHT ESSENTIAL TO THE ENJOYMENT OF LIFE, AT THE MERE WILL OF ANOTHER, SEEMS TO BE INTOLERABLE IN ANY COUNTRY WHERE FREEDOM PREVAILS, AS BEING THE ESSENCE OF SLAVERY ITSELF. *** THOUGH THE LAW ITSELF BE FAIR ON ITS FACE, AND IMPARTIAL IN APPLIANCE, YET, IF IT IS APPLIED AND ADMINISTERED BY PUBLIC AUTHORITY WITH AN EVIL EYE AND AN UNEQUAL HAND, SO AS PRACTICALLY TO MAKE UNJUST AND ILLEGAL DISCRIMINATIONS BETWEEN PERSONS IN SIMILAR CIRCUMSTANCES, MATERIAL TO THEIR RIGHTS, THE DENIAL OF EQUAL JUSTICE IS STILL WITHIN THE PROHIBITION OF THE CONSTITUTION. ***" (Capitals added.)

In the case of *Aubry Williams* vs. *State of Georgia,* 211

Ga. 763, 88 S.E. 2nd 376, the Supreme Court of Georgia criticised the decision of the U. S. Supreme Court in the same case in 349 U. S. 375, holding that the ruling of the Georgia Supreme Court in 210 Georgia 665 did not rest upon an adequate non-Federal ground which would deprive Federal Supreme Court of jurisdiction to find that a substantive issue was properly before it and that orderly procedure required a remand to the Georgia Supreme Court for reconsideration of the case. The Georgia Supreme Court accused the U. S. Supreme Court in its decision in that case of violating the 10th Amendment of the U. S. Constitution providing that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," and stated: "Even though executives and legislators, not being constitutional lawyers, quite often overstep the foregoing unambiguous constitutional prohibition of Federal invasion of State jurisdiction, there can never be an acceptable excuse for a JUDICIAL failure to strictly observe it. This court bows to the Supreme Court on all Federal questions of law BUT WE WILL NOT SUPINELY SURRENDER SOVEREIGN POWERS OF THIS STATE *** THE SUPREME COURT, 349 U.S. 375, 75 S. Ct. 814, undertakes "to remand the case for further consideration, and in their opinion has pointed to Georgia law vesting in the trial judge discretion in ruling upon an extraordinary motion for new trial AND APPARENTLY CONCLUDED THEREFROM THAT THIS COURT SHOULD REVERSE THE TRIAL COURT BECAUSE THAT DISCRETION WAS NOT EXERCISED IN THE WAY THE SUPREME COURT WOULD HAVE EXERCISED IT. *** WE STATE THAT OUR OPINION IN WILLIAMS VS. STATE, 210 Ga. 665, 82 S.E. 2nd 217, IS SUPPORTED BY SOUND AND UNCHAL-

LENGED LAW, CONFORMS WITH THE STATE AND FEDERAL CONSTITUTIONS, and stands as the judgment of all seven of the justices of this court."

YET THE GEORGIA SUPREME COURT IN THE CASE AT BAR IN DENYING PLAINTIFF'S PETITION FOR CERTIORARI AND MOTION FOR RECONSIDERATION HAS UTTERLY IGNORED THE FACT THAT IT THEREBY DEPRIVES PLAINTIFF OF HER PROPERTY IN THE AMOUNT OF HER VERDICT, JUDGMENT, AND FI. FA. AGAINST THE DEFENDANT IN THIS CASE WITHOUT DUE PROCESS OF LAW AND WITHOUT EQUAL PROTECTION OF THE LAW IN VIOLATION OF ARTICLE I, SECTION I, PARAGRAPHS 2 AND 3 OF THE GEORGIA CONSTITUTION AND SECTION I OF THE 14th AMENDMENT OF THE U. S. CONSTITUTION, AND IN VIOLATION OF ALL THE PRIOR DECISIONS OF SAID COURT AND THE COURT OF APPEALS OF GEORGIA ON THE POINT HERE INVOLVED APPLIED TO OTHER PERSONS IN LIKE CIRCUMSTANCES AND SIMILAR SITUATIONS, INCLUDING BECKER VS. TRUITT, 39 Ga. App. 286, 170 Ga. 757; EXECUTIVE COMMITTEE OF THE BAPTIST CONVENTION OF GEORGIA VS. SMITH, 44 Ga. App. 184; ESLINGER VS. HERNDON, 158 Ga. 823; SMITH VS. HARTRAMPF, 105 Ga. APP. 40; MOODY AND WIFE VS. DAVIS, 10 Ga. 410-12; AND CENTRAL OF GEORGIA RAILWAY CO. VS. YESBIK, 146 Ga. 620, AS WELL AS THE UNIFORM DECISIONS OF THE U. S. SUPREME COURT CONSTRUING AND APPLYING THE 14th AMENDMENT TO SUCH CASES.

As stated by this Court in *Williams* vs. *State of Georgia*, 349 U.S. 375, "A state court may not, in the exercise of its

discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner."

The record in this case shows that the Plaintiff obtained a valid verdict, judgment, and fi. fa. against the Defendant in its assumed or trade name after due and legal service upon it and that she has been ARBITRARILY, CAPRICIOUSLY, AND ILLEGALLY deprived by the Court of Appeals of Georgia of her right to have said fi. fa. levied upon the property of the Defendant to satisfy same, without due process of law and without equal protection of the law, in violation of Section I of the 14th Amendment.

WHEREFORE, Petitioner urges that she is entitled as a matter of absolute constitutional right under Section I of the 14th Amendment to the grant of the writ of certiorari to the Court of Appeals of Georgia and reversal of its arbitrary, capricious, and unconstitutional decision denying her said constitutional rights.

Respectfully submitted,

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Of Counsel

ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged and copy received of the foregoing petition for certiorari.

This August , 1962.

Counsel for Jackson's Atlanta Ready Mix Concrete Company, Inc.

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No. 389

APPENDIX

to the

PETITION FOR THE WRIT OF CERTIORARI

to the

COURT OF APPEALS OF GEORGIA IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1962, No. 389

In the Case of Mrs. Agnes June Dillard, Petitioner, vs. Jackson's

Atlanta Ready Mix Concrete Company, Inc., Defendant

39258. DILLARD v. JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.

105 Ga. App. 607, 125 S.E. 2nd 656

For reasons stated in the opinion, the trial court did not err in denying the motion for judgment non obstante verdicto, nor in denying the motion for new trial.

DECIDED MARCH 15, 1962—REHEARING DENIED MARCH 29, 1962.

Claim, etc. Fulton Superior Court. Before Judge Tanksley.

Agnes J. Dillard, plaintiff in error, brought suit in Fulton Superior Court against Jackson Ready Mix Concrete Company, Inc., to recover damages alleged to have been sustained in a collision between her automobile and the defendant's truck. A copy of the petition and process was served upon Jackson's Atlanta Ready Mix Concrete Company, Inc. at its place of business, 1000 Seaboard Avenue, in Atlanta. The damage suit was not defended and plaintiff obtained a verdict and judgment, upon which execution issued. The fi. fa. was levied upon the machinery, equipment and trucks found at 1000 Seaboard Avenue, and to this levy Jackson's Atlanta Ready Mix Concrete Company, Inc. filed a statutory claim and a further pleading or affidavit in which it was averred that (a) Jackson's Atlanta Ready Mix Concrete Company, Inc. was not the defendant in fi. fa., and that it had not operated under the assumed or trade name of Jackson Ready Mix Concrete Company, Inc.; (b) Jackson's Atlanta Ready Mix Concrete Company, Inc. had never been served with process in the damage action and (c) that Jackson's Atlanta Ready Mix Concrete Company, Inc. had never had its day in court. There was no demurrer or objection to this pleading or affidavit and the trial proceeded upon the issue of whether Jackson

Ready Mix Concrete Company, Inc. and Jackson's Atlanta Ready Mix Concrete Company, Inc. were one and the same; i.e., whether Jackson Ready Mix Concrete Company, Inc. was an assumed or trade name of Jackson's Atlanta Ready Mix Concrete Company, Inc. Evidence was submitted in support of the contention of plaintiff in fi. fa. that such was true, and contra evidence was introduced by the claimant. The jury returned a verdict in favor of the claimant, finding the property not subject. Plaintiff in fi. fa. thereupon filed her motion for new trial, and to the judgment denying the motion as amended she now assigns error.

G. Seals Aiken, Ben F. Sweet, for plaintiff in error.

Scott Walters, Jr., Wavelyn E. Smith, contra.

EBERHARDT, Judge. 1. It is complained in special ground four of the amended motion for new trial that the court failed to charge, pursuant to a written request: "I charge you that a judgment obtained against a person or corporation in his or its assumed or trade name is not void but is valid and binding upon said person or corporation." It appears that the court did charge that "if a corporation or legal entity actually conducts business under an assumed name or trade name, and if such corporation or legal entity be sued in its assumed name or trade name, the fact that the corporation was sued under its trade name and not by its proper name, does not render the judgment void if the corporation is the identical legal entity against whom the judgment was rendered." The assignment of error complains that the failure to give the request in charge was error because (1) it stated a correct principle of law applicable to the pleadings and the evidence, (2) it was not covered or substantially covered in the general charge, and (3) several of the charges given were in direct conflict with the correct, applicable, and controlling law as contained in said request.

As to (1) and (2), a comparison of the request with the charge as given discloses that while the request was a correct statement of a principle, it was indeed covered by the charge, though in slightly different language. The assignment of error is thus insufficient. *Griffith v. Newman*, 217 Ga. 533, 540 (3) (123 SE2d 723).

As to (3), it is not pointed out in this ground of the motion that "several of the charges were in direct conflict," nor how or wherein the conflict lies,—nor do we find such. It is not complete if reference to other grounds of the motion, or to other portions of the record is necessary to an understanding of the assignment, as is the case here. *Loflin v. Home Ins. Co.*, 40 Ga. App. 246 (1). (149 SE 308); *Davies v. Blasingame*, 177 Ga. 450 (6). (170 SE 477). "The assignments of error must be complete in themselves." Leverett, Hall & Christopher, Georgia Procedure & Practice, 544, § 23-9. There is no merit in this ground.

2. In special ground five complaint is similarly made that the court failed to give in charge a request that: "I charge you that where a judgment is obtained against a person or corporation in his or its assumed or trade name, the said person or corporation is a party to the judgment and is not entitled to file claim for property levied upon to satisfy the judgment." The court did charge: "If you find from the evidence in this case that Jackson's Atlanta Ready Mix Concrete Company, Inc. is in reality the defendant in fi. fa., Jackson Ready Mix Concrete Company, Inc., doing business at 1000 Seaboard Avenue, then I charge you that Jackson's Atlanta Ready Mix Concrete Company, Inc. would be precluded from making any sort of claim to the property levied upon, and the purported claim which it filed would be a mere untility." The assignments of error are identical with those in special ground four, and for the same reasons are without merit.

3. The charge, complained of in special ground six, that the burden of proof was upon plaintiff in fi. fa. and that if she failed to carry it, a verdict should be returned for the claimant, was proper. It does not appear that the property levied upon was in the possession of the defendant in fi. fa. at the time of the levy. Consequently, under *Code* § 39-904, the burden of proof was on plaintiff in fi. fa. *Hicks v. Hicks,* 193 Ga. 382 (18 SE2nd 763); *Whitlock v. Michael,* 206 Ga. 749 (58 SE2d 833).

4. In special ground seven error is assigned upon the reading by the court, in connection with the charge to the jury of what was designated by the court as a "further claim" by Jackson's Atlanta Ready Mix Concrete Company, Inc., and what is designated by plaintiff in error as an affidavit of illegality. Although the defendant in fi. fa. may not file a claim (*Goolsby v. Bd. of Drainage Commissioners,* 156 Ga. 213 (6a), 119 SE 644), since "only a third person, not a party to the execution, could interpose a claim" (*Wynn v. Irvine's Ga. Music House,* 109 Ga. 287, 288, 34 SE 582), it appears here that Jackson's Atlanta Ready Mix Concrete Company, Inc. was not a party to the execution unless the jury should find that Jackson Ready Mix Concrete Company, Inc. was an assumed or trade name of Jackson's Atlanta Ready Mix Concrete Company, Inc.

In *Pearson v. Stamey,* 45 Ga. App. 87 (163 SE 264), it was held that where the *defendant in fi. fa.* files an affidavit of illegality, and a *third party* interposes a claim, the illegality and the claim make two separate cases. Such is not the case here.

The claim and the affidavit, or "further claim," here, both filed by Jackson's Atlanta Ready Mix Concrete Company, Inc., and the fi. fa. with the fact of levy thereunder, were treated by the parties and by the court as pleadings

which made the issue to be tried.[1] There is no merit in the contention that it was error for the court to read the "further claim" or affidavit in connection with its charge as setting forth contentions of the claimant.

5. Special ground eight complains of a charge that where a defendant in a suit is served with a process in which an entirely different person or party is named as defendant, the process is void as to the person so served and a judgment based thereon is likewise void. The charge was a correct statement of the law and was not, for any reason assigned, erroneous. *McGowans v. Speed Oil Co.*, 94 Ga. App. 35 (93 SE2d 597); *Nashville &c. Ry. Co. v. Edwards*, 91 Ga. 24 (16 SE 347); *Seisel & Co. v. Wells*, 99 Ga. 159 (1) (25 SE 266); *Smith v. Hartrampf*, 105 Ga. App. 40 (123 SE2d 417).

6. A charge to the effect that a judgment rendered against a defendant with a name similar to a particular corporation would not be binding upon that corporation unless the corporation was doing business under the name against which the judgment was rendered or if the corporation was not in fact the legal entity being sued, was not

[1]As will appear from the amended motion for new trial, the following colloquoy took place between court and counsel at the beginning of the trial:

"The Court: That makes the whole issue really just one question, whether or not Jackson Ready is actually the same as Jackson's Atlanta?

"Mr. Aiken: That is it, that is the question. But it seems to me the burden of proof—

"Mr. Walters: The question is, when Mr. Aiken sued in that name, was that sufficient to get a judgment to the finding on Jackson's Atlanta.

"Mr. Aiken: Yes, I think that is correct. . . ."

Thus, there was agreement that the issue to be tried was the same as that raised in the "further claim."

error, since it was adjusted to the pleadings and to the evidence. There is no merit in special grounds nine and ten of the motion.

7. There was no error in the charge that, if the jury should find that plaintiff in fi. fa. did not have a judgment that was binding against Jackson's Atlanta Ready Mix Concrete Company, Inc. their verdict should be for the claimant. Under the pleadings and the evidence such was a proper charge.

8. It is not error for the court to state the contentions of the respective parties in giving its charge to the jury. When the contentions are fairly stated it should be helpful to the jury in resolving the issues. Special ground twelve of the amended motion shows no error.

9. Special grounds 13 and 14 complain of the exclusion of listings in a city directory, and of notations relative thereto made by the enumerator for the directory company when he collected the information for listings. Claimant denied that the particular listings were made by its authorization, and the enumerator who collected the information tesified that he could not say from whom he obtained the information, and that such information is often gotten from interviews with maids, yardmen, people next door and the like. The listings were hearsay, and the exclusion was proper.

10. There was circumstantial evidence from which the jury might have found that Jackson Ready Mix Concrete Co., Inc. was an assumed or trade name of Jackson's Atlanta Ready Mix Concrete Co., Inc.; but there was direct testimony from A. P. Jackson, President of Jackson's Atlanta Ready Mix Concrete Co., Inc., and from H. N. Jackson, Jr., its general manager, that it did not use such an assumed or trade name and had authorized no one to do so in its behalf, and had not authorized telephone or city directory

listings under such a name. Records in the office of the Clerk of Fulton Superior Court disclose that Jackson's Atlanta Ready Mix Concrete Co., Inc., was regularly chartered, but had no registered trade name as is provided in *Code Title* 106. Thus, there was evidence which would authorize a contrary conclusion.

Plaintiff introduced in evidence certain pleadings in which she contends there were admissions in judicio by Jackson's Atlanta Ready Mix Concrete Co., that it did have the assumed or trade name of Jackson Ready Mix Concrete Co., Inc. One was a traverse of the service of process in the proceeding wherein the judgment was obtained and the fi. fa. issued. This traverse was captioned "Mrs. Agnes June Dillard v. Jackson Ready Mix Concrete Co., Inc." and it begins with the statement, "Now comes Jackson's Atlanta Ready Mix Concrete Co., Inc., herein referred to as Jackson Ready Mix Concrete Co., Inc." and further recites that this special appearance is made for the sole purpose of traversing the entry of service. It was dismissed June 20, 1960. Another was a traverse similarly captioned "Mrs. Agnes June Dillard v. Jackson Ready Mix Concrete Co., Inc.," and begins with the statement "Now comes Jackson's Ready Mix Concrete Co., Inc., apparently one of the defendants" and makes this special appearance for the sole purpose of traversing the entry of service. There is no mention of or reference to Jackson's Atlanta Ready Mix Concrete Co., Inc. in it. It was dismissed December 15, 1959. The third was a pleading bearing the same caption and beginning with the recital "Comes now Jackson's Atlanta Ready Mix Concrete Co., Inc., herein referred to as Jackson Ready Mix Concrete Co., Inc." and alleges that "This defendant shows that there is a Jackson Ready Mix Concrete Co., Inc. in Fulton County, Georgia, but this defendant is not such company and such company does not have an office or place

of business at 1000 Seaboard Avenue, Atlanta, Georgia."

We see no admission in these pleadings by Jackson's Atlanta Ready Mix Concrete Co., Inc. that it had or used the assumed or trade name of Jackson Ready Mix Concrete Co., Inc. The recitals in the opening of the pleadings simply identify the cause in which they are filed "Herein referred to as Jackson Ready Mix Concrete Co., Inc." says no more than that the plaintiff in her petition makes such reference. And, as will be observed, the fact or existence of the trade or assumed name or that Jackson's Atlanta and Jackson Ready Mix are the same is expressly denied.

If either of the traverses be construed as containing such an admission, it could be controverted since both of them were dismissed. *Florida Yellow Pine Co. v. Flint River &c. Co.*, 140 Ga. 321 (2) (78 SE 900). Certainly there is no such admission in the other pleading, where the matter is expressly denied.

Boiled down, there was here nothing more than a factual question to be resolved by the jury as to whether Jackson's Atlanta Ready Mix Concrete Co., Inc. did or did not have an assumed or trade name, and whether it was one and the same as the defendant in fi. fa. The evidence on that issue was in conflict, and the jury resolved it in favor of the claimant and against the plaintiff. We can do no better than to reiterate what Judge Russell, later Chief Judge of this court and afterward Chief Justice of the Supreme Court, said in *Davis v. Kirkland*, 1 Ga. App. 5, 7 (58 SE 209): "Since the birth of Magna Charta,—one of law's leading citizens,—whenever internal dissension or revolution arises in the territory of evidence, to determine which contending faction shall be entitled to the jewel truth, she calls in, as sole arbiter to settle the dispute, jury, who under law's irrevocable appointment shall settle, in every nook and corner of law's pro-

tectorate,—the domain of facts,—all issues, great and small. The wisdom of all men most enlightened, the experience of those most familiar with the practice, the innate sense of justice, all concur in the opinion that disputes between such varying and variable characters as visit and inhabit the domain of facts can not be satisfactorily adjusted and finally determined by any umpire more absolutely reliable and just than the jury." Such has been the view of this court from the beginning of its existence, and such cases as *Central R. Co. v. Ferguson,* 63 Ga. 83, 85, where Judge Bleckley declared: "The evidence is not conclusive. It pushes the mind into the great pit-fall called doubt, and there leaves it. The jury are the best doctors of doubt that we know of; . . ." and *Richmond & Danville R. Co. v. Allison,* 89 Ga. 567, 571 (16 SE 116) in which Judge Gober asserted that "The prevailing party who gets a verdict has a property right in it; the court that sets it aside without some sufficient reason forgets the Constitution which declares that the right of trial by jury shall remain inviolate . . . ," indicate a similar view held by the Supreme Court from its beginning.

"The jury system may indeed have its faults. The complexities of human nature and behavior are such that, in regard to many conflicts that arise, no means have yet been devised of being certain of absolute truth or absolute justice. The best that can be done is to strive toward those ideals and to minimize the percentage of error. But the basic ideas of the system and its evolvement into our present method have been functioning quite well for some hundreds of years. So far as we are aware, it is the best system yet devised. Even if that were not so, whatever its advantages or its frailties, we are wedded to it and our loyalties are committed. One of its most fundamental tenets is that the determination of the facts is left exclusively to the jury. It is not our prerogative to let our suspicions or predilections obscure our

duty to abide by that rule." Lemmon v. Denver & Rio Grande &c. R. Co., 9 Utah 2d 195 (341 P2d 215).

There is no merit in the general ground of the motion for new trial. That motion, and the motion for judgment non obstante verdicto were properly denied. Even if it be said that the preponderance of the evidence was against the verdict, that would afford no cause for reversal of a judgment denying those motions. *Page v. Page,* 217 Ga. 606, 608 (1) (123 SE2d 922). To use the baseball vernacular, plaintiff simply struck out before the jury—no hits, no runs, and no errors.

Judgment affirmed. Carlisle, P. J., and Russell, J., concur.

JUDGMENT OF COURT OF APPEALS IN THE ABOVE STATED CASE.

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta, March 15, 1962

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered: Agnes J. Dillard v. Jackson's Atlanta Ready Mix Concrete Co., Inc.

This case came before this court upon a writ of error from the Superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Carlisle, Eberhardt and Russell, JJ., concur.

Bill of costs, $15.00.

COURT OF APPEALS OF THE STATE OF GEORGIA.

Clerk's Office, Atlanta, August 31, 1962.

I certify that the above is a true extract from the minutes

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 889

MRS. AGNES JUNE DILLARD,
Petitioner,

vs.

JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.,
Respondent.

REPLY BRIEF TO PETITION FOR CERTIORARI.

HOSEA ALEXANDER STEPHENS,
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Of Counsel:
SCOTT WALTERS, JR.,
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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. .....

MRS. AGNES JUNE DILLARD,
Petitioner,

vs.

JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.,
Respondent.

REPLY BRIEF TO PETITION FOR CERTIORARI.

Comes now Jackson's Atlanta Ready Mix Concrete Company, Inc., Respondent, and shows the court in response to the within petition and by way of amplification the following:

REFERENCE TO THE OFFICIAL REPORTS:

This case is reported as 105 Ga. App. 607, January Term, 1962. The Court of Appeals of Georgia.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article VI—Paragraph IV of the Constitution of the State of Georgia 1945, 2-Ga. Code Ann. 3704.

"The Supreme Court shall have no original jurisdiction but shall be a court alone for the trial and correction of errors of law from the superior courts and the city courts of Atlanta and Savannah, as existed on August 16, 1916, and such other like courts as have been or may hereafter be established in other cities, in all cases that involve the construction of the Constitution of the State of Georgia or of the United States. . . ."

USCA-28-1257 FCA, Title 28, Section 1257.

Final judgments and decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn into question or where the validity of a State statute is drawn in question of the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

QUESTIONS PRESENTED FOR REVIEW.

(1) Whether the Federal question is properly raised.

(2) Assuming that the Federal question is properly raised whether the petitioner for Certiorari presents the question for review.

STATEMENT OF THE CASE.

To the petitioner's in Certiorari statement of the case should be added, that the judgment complained of is an affirmance of a jury verdict, which has been approved by the trial judge and by the Court of Appeals, on review, on the basis of there being simply a question of fact for the jury as to whether Jackson's Atlanta Ready Mix Concrete Company, Inc., did or did not have an assumed or trade name and whether it was one and the same as the defendant in fi fa. Thereafter, and in the appellate court, the constitutional question was raised along with other questions in a motion for rehearing. An application for certiorari was made to the Supreme Court, of the State of Georgia, seeking to review the decision of the Court of Appeals of Georgia and certiorari was denied. Thereafter a motion for rehearing was made on the denial, and a "supplement to or a condensation of the motion of petitioner for reconsideration of the denial of her petition for certiorari" was filed. This was the last pleading filed in any court in the state of Georgia in this case and it did not argue or present any question under the Constitution of the United States or of the State of Georgia: but it simply alleged in numbered paragraph 12 "Panel Three of the Court of Appeals committed many other serious errors of great public concern requiring the grant of Writ of Certiorari as pointed out in the petition for certiorari and motion for reconsideration, but in the interest of brevity they will not be referred to in this paper because the foregoing grave errors of public concern require the grant of a Writ of Certiorari without even considering the other assignments of error."

ARGUMENT.

This court has held that a mere assertion in a state court of a Federal right in a petition for rehearing affords no grounds for invoking the jurisdiction of the Supreme Court unless the court below, in dealing with the petition passed upon the Federal ground relied upon. **Bowe v. Scott**, 233 U. S. 658, 58 L. Ed. 1143, 34 S. C. R. 769; and the Federal question must have been set up at the proper time and the proper way. **Chappell v. Bradshaw**, 128 U. S. 132, 32 L. Ed. 369, 9 S. C. R. 40.

Georgia courts have held from the case of **Epps v. State**, 19 Ga. 102, 123 (1955), to the case of **Veasey v. State**, 216 Ga. 775, 777 (1961), and apparently are still so holding that a question not raised in the lower court is not considered on review. Relying on the section of the Georgia Constitution quoted above the appellate courts of Georgia consistently holds that they sit to review rulings and will not consider questions on which no rulings were made by the trial judge. **McDonald v. Wimpy**, 206 Ga. 270, 56 S. E. (2) 4524 (19); **Foster v. Phinizy**, 121 Ga. 673, 49 S. E. 865 (1905).

In the instant case the petitioner for certiorari in her Bill of Exceptions asserted that the Court of Appeals had jurisdiction of the review, as the case was not one in which the Supreme Court has exclusive appellate jurisdiction. This was in essence an assertion on her part that no substantial constitutional question was involved. Ga. Code Ann. 2-3704.

Petitioner cites the case of **Williams v. The State of Georgia**, 349 U. S. 375, 99 L. Ed. 1161, 75 S. Ct. 814 (1954). That case is not a case in which the constitutional question was raised on review, but one in which it was raised in extraordinary motion for new trial **and was ruled on by the trial court.**

The case of **American Surety Company v. Baldwin**, 287 U. S. 156, 77 L. Ed. 231 (1932), holds that a writ of cer-

tiorari to review a judgment of a state court will be dismissed where the Federal claim was not reasonably made in the state court.

There is no contention by petitioner, at any point, that this question was ever raised in the trial court. She affirmatively shows that it was not suggested until a motion for rehearing in the first appellate court. She suggests no reason, legal, logical or otherwise why it could not have been raised sooner. Her complaint, if it be so denominated, appears to address itself more to the Court of Appeals than the trial court.

The decision of the Court of Appeals under attack clearly shows that a question of fact existed and was resolved against petitioner.

For the foregoing reasons it is respectfully submitted: Firstly, that the Constitutional question was not reasonably raised. Secondly, that the constitutional questions were abandoned before the petitioner in certiorari concluded her quest through the State courts. Thirdly, that the case simply presented a question of fact that was resolved against petitioner by twelve jurors, and their finding was approved by one trial Judge, three court of Appeal Judges, twice, then nine Court of Appeal Judges, and finally nine Georgia Supreme Court Justices twice on application for certiorari and motion to reconsider.

Respectfully submitted,

.....

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Attorney for Jackson's Atlanta
Ready Mix Concrete Company,
Inc.
Grant Building,
Atlanta, Georgia.

Of Counsel:

SCOTT WALTERS, JR.,
WAVELYN E. SMITH.

of the Court of Appeals of Georgia, and that paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

MORGAN THOMAS, Clerk.

Georgia, Fulton County.

I, G. Seals Aiken, Attorney for Petitioner in Certiorari in the foregoing case, acknowledge service of a copy of the within and foregoing reply brief to said petition for certiorari and all further service is hereby waived.

This .... day of September, 1962.

.....

G. Seals Aiken,
Attorney for Petitioner in Certiorari Agnes June Dillard.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 389

MRS. AGNES JUNE DILLARD,

Petitioner

vs.

JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.,

Defendant,

~~Reply Brief of~~ Petition For Writ of Certiorari to the Court of Appeals of Georgia

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CHARLES W. BERGMAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 389

MRS. AGNES JUNE DILLARD,
Petitioner

vs.

JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.
Defendant

REPLY BRIEF OF PETITIONER FOR CERTIORARI

Now comes Mrs. Agnes June Dillard, Petitioner for Certiorari, and shows to the Court, in response to the reply brief of Respondent, the following:

Respondent's principal contention is that the constitutional question was not reasonably raised. Is it not clear from the facts and circumstances presented in the petition for certiorari that the constitutional question was reasonably raised? Does the exercise of prudence and reasonableness require anticipation that the State Court of Appeals would fail to adhere, as it did in this case, to the well recognized and bind-

ing prior decisions of that Court as well as the Supreme Court of Georgia as to the efficacy of judgments against a person or party (natural or artificial) using a fictitious or trade name? Must a party litigant assume that the State Appellate Court will evade application of such prior and binding decisions by holding the evidence presented a question of fact for the jury to determine, whereas the verdict was unsurported by any competent evidence and was contrary to the solemn admissions in judicio of the Respondent?

On page 8 of the appendix will be found the following statement by the Court of Appeals: "Boiled down, there was nothing more than a factual question to be resolved by the jury as to whether Jackson's Atlanta Ready Mix Concrete Company, Inc. did or did not have an assumed or trade name, and WHETHER IT WAS ONE AND THE SAME AS THE DEFENDANT IN FI. FA. THE EVIDENCE ON THAT ISSUE WAS IN CONFLICT, and the jury resolved it in favor of the claimant and against the plaintiff." (Emphasis supplied).

Was the evidence on the issue of identy in conflict? Nothing is or could be more at variance with the actual facts. Examples: 1. The introductory paragraph of one of the traverses reads: "Now comes Jackson's Atlanta Ready Mix Concrete Company, Inc., one of the defendants in said matter, and at the first term of said court after notice to him of service purporting to show him legally served in Fulton County, Georgia and traverses same***. This defendant was never legally served through any officer or agent as by law provided.***" On dismissal of said traverse by the same attorneys it was stipulated: "Jackson's Atlanta Ready Mix Concerete Company after levy made, HAVING FILED A THIRD PARTY CLAIM IN THE WITHIN MATTER,

the above traverse is hereby withdrawn and dismissed." (Capitals added). 2. In a proceeding to act aside and vacate petitioner's judgment (which was never withdrawn), Respondent Jackson's Atlanta Ready Mix Concrete Company, Inc. EXPRESSLY DESIGNATED ITSELF SEVEN TIMES AS THE DEFENDANT. (R.58). 3. The copy of the complaint and process served upon its employee, E. H. Lambert, was produced and in court on the trial of the claim case and by stipulation was admitted as having been served. (R.47-8 and 54). 4. Plaintiff's exhibit number 4, being page 271 of the Alphabetical Section of the Telephone Directory, showed the listing: "JACKSON READY MIX CONCRETE CO. INC. 1000 SEABD NE JA 5-2758". Another page of said directory shows "JACKSON'S READY MIX CONCRETE" on a picture of a cement mixing truck. These are but four examples of evidence in the record showing that the Respondent is the same entity or party as Jackson Ready Mix Concrete Co. Inc., the Defendant in Fi. Fa.

In STATE OF MISSOURI, EX REL. MISSOURI INSURANCE CO. V. GEHNER, ETC., 281 U.S. 313, 50 S. Ct. 326, this court held: *"it may not be reasonably held that the* (Insurance) *Company was bound to anticipate such a construction or in advance to invoke Federal protection against the taxation of its United States bonds.* Upon the facts disclosed by the record it is clear that appellant sufficiently raised in the highest court of the State the Federal questions here presented, and is entitled to have them considered." (Emphasis added)...

Very shortly thereafter, in BRINKERHOFF-FARIS TRUST & SAVINGS CO. V. HILL, ETC., 281 U.S. 673, 50 S. Ct. 451, "On petition for rehearing in State Supreme Court, plaintiff asserted that in applying a new construction

of a State statute, and in refusing relief because of newly found powers of State Tax Commission, the court transgressed the due process clause of the Fourteenth Amendment," and this court reversed "the judgment of the Supreme Court of Missouri . . . because it "denied to the plaintiff 'due process of law' — using that term in its primary sense of an opportunity to be heard and to defend its substantive right."

"It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights." Dan Rogers v. Ala., 192 U.S. 226, 24 S. Ct. 257.

In view of the decisions of this court in the three cases cited next above, it would appear that Petitioner in this case was not bound to anticipate that the Court of Appeals of Georgia would fail to follow its prior and well established decisions that a judgement against a person (natural or artificial) in his or its assumed or trade name is valid and binding, and that such a person is a party to the judgment, and is not entitled to file a claim to property levied upon to satisfy the the judgment, as well as prior decisions of the Supreme Court of Georgia to the same effect, and that Petitioner could therefore invoke protection of the due process and equal protection of the law clause of the Fourteenth Amendment upon motion for rehearing as made upon its failure to follow its prior binding decisions and those of the Supreme Court of Georgia on said point. The Court of Appeals of Georgia in Becker v. Truitt, 39, Ga. App. 286, 146 S.E. 654, and the Supreme Court of Georgia in Becker v. Truitt, 170 Ga. 757, 154 S.E. 262, had held that where process had been served on "City Coal and Grading Co.", and default judgment was entered against it upon its failure.

to answer, Charles L. Truitt, sole owner and proprietor of City Coal & &Grading Co., was precluded from interposing a claim for the property levied upon on the ground that he was not the party against whom the judgment was rendered.

As stated in the Petition for Certiorari, the uniform decisions of the Court of Appeals and the Supreme Court of Georgia, including Becker vs. Truitt, 39 Ga. App. 286, 146 S.E. 654; Becker vs. Truitt, 170 Ga. 757, 154 S.E. 262; Executive Committee of the Baptist Convention of Ga. vs. Smith, 44 Ga. App. 184, 161 S.E. 143; Eslinger vs. Herndon, 158, Ga. 823, 124 S.E. 169; and Smith vs. Hartrampf, 105 Ga. App. 40, 123 S.E. 2nd 417, hold that a judgment rendered against a person (natural or artificial) in his or its assumed or trade name is not void but valid and binding, and that such a person is a party to the judgment and is not entitled to file a claim to the property levied upon to satisfy the judgment and execution based thereon. The facts in the two Becker cases are very similar to the facts in the present case.

Respondent argues that the case of Williams vs. State of Georgia, 349 U. S. 375, 75 S. Ct. 814, cited on behalf of Petitioner, is NOT a case in which the constitutional qeustion was raised on review "but one in which it was raised in the extraordinary motion for a new trial and was ruled on by the trial court." Mr. Justice Frankfurter's statement of the Williams case includes the following: "While this court's decision in the Avery case was thus rendered over two months after Williams' trial, it came a month before the amendment to his formal motion for new trial. Yet Williams' counsel did not rely upon the ground raised by the Avery decision until six months later in his extraordinary motion for new trial."

With due regard to the circumstances of the Williams case, it is nevertheless submittted that if it is not unreasonable to assert a constitutional ground on an extraordinary motion for a new trial, MADE AFTER AN AFFIRMANCE BY THE APPELLATE COURT of a judgment of the trial court, then it is not unreasonable to assert a constitutional ground upon petition for rehearing after an affirmance by the appellate court of the judgment of the trial court, the effect of affirmance by the appellate court of the judgment of the trial court being to deprive petitioner of due process of law and equal protection of the law guaranteed by both the State and Federal Constitutions.

In the case of Patterson vs. State of Ala., 294 U.S. 600, 55 S. Ct. 575, this court granted certiorari and reversed the Supreme Court of Alabama where the State contended the U. S. Supreme Court lacked jurisdiction because the State Court's judgment rested entirely on question of State appellate procedure, and held that it was required to examine record to determine whether judgment was based on adequate non-federal ground.

In the case of Norris vs. Ala., 294 U.S. 587, 55 S. Ct. 579, this court held that where a federal right is specially claimed in a State court, the U. S. Supreme Court must inquire whether right was denied, not merely in express terms, but also in substance and effect, and, if necessary, evidence must be examined.

In the case of Herndon vs. Lowry, Sheriff, 301 U.S. 242, 57 S. Ct. 732, this court reversed the Supreme Court of Georgia in 182 Ga. 582, 186 S.E. 429, where the federal constitutional question was raised in a habeas corpus proceeding after Herndon's conviction by a jury in Fulton Superior Court had been approved by said court, and af-

firmed by the Supreme Court of Georgia and this court.

The contention of respondent that the constitutional question in this case was abandoned before petitioner concluded her quest through the state courts is entirely incorrect. As pointed out on page 6 of the petition for certiorari, petitioner duly filed a petition with the Supreme Court of Georgia for a writ of certiorari to review, correct, and reverse the erroneous decision of the Court of Appeals upon the same grounds urged in plaintiff's motion for rehearing in the latter court (R.104). It was denied (R.105). Petitioner also filed in the Supreme Court of Georgia a motion for reconsideration of the denial of her petition for certiorari to the Court of Appeals, which was likewise denied, as per certificate of the clerk of the former. Petitioner urged at every step the federal constitutional ground raised in her petition for rehearing in the Court of Appeals of Georgia.

The statement of Respondent that the judgment complained of was approved by nine Court of Appeals Judges is incorrect. Petitioner duly made a motion to Hon. Jule W. Felton, Chief Judge of the Court of Appeals of Georgia for a rehearing of her case before the full court of nine judges of said court pursuant to Ga. Code Ann. Sec. 24-3501 (Pocket Parts). That code section declares its purpose is "to avoid and reconcile conflicts among the decisions of the three divisions and to secure more authoritative decisions" and provides for a decision by the full court of nine judges under certain conditions therein specified to prevent such conflicts. As pointed out in petitioner's motion for rehearing in the Court of Appeals and in her motion for a rehearing by the full court of nine judges, the decision of Panel 3 of the Court of Appeals in this case is in direct conflict with the decision of

Panel 2 in Becker vs. Truitt, 39 Ga. App. 286, that of Panel one in Smith vs. Hartramph in 105 Ga. App. 40, and that of said court in Executive Committee of the Baptist Convention of Ga. vs. Smith, 44 Ga. App. 184, 161 S.E. 143. Nevertheless said motion of petitioner for a rehearing by the full court of nine judges was denied.

As pointed out in the petition for certiorari, no question of fact is presented where the respondent makes a solemn admission in judicio in the main case that it is the defendant in fifa. as it did in this case or where the uncontradicted evidence shows the same. (R. 58, pages 10 and 11 of the petition for certiorari).

Respondent contends that petitioner in effect asserted that no substantial constitutional question was involved by stating that the Court of Appeals had jurisdiction as the case was not one in which the Supreme Court of Georgia had exclusive appellate jurisdiction, citing Ga. Code Ann. 2-3704. There is no merit in this contention of Respondent, because (1) Petitioner could not anticipate that the Court of Appeals would not follow its prior controlling decisions on the point involved and (2) the Supreme Court of Georgia in construing Ga. Code Ann. Sec. 2-3704 has uniformly held that the Court of Appeals, and not the Supreme Court of Georgia, has jurisdiction to decide questions of law involving application of plain and unambiguous provisions of the Constitution. Abbott et al v. State, 211 Ga. 200, 84 S.E. 2nd 667; Felkner v. Still, 176 Ga. 735, 169 S.E. 15; Baker v. State, 198 Ga. 290, 31 S.E. 2nd 398. 397,

Petitioner therefore again urges that she is entitled as a matter of constitutional right under Section I of the 14th Amendment to the grant of the writ of certiorari to the Court

of Appeals of Georgia and reversal of its arbitrary, capricious, and unconstitutional decision.

Respectfully submitted,
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Attorney for Petitioner
1409 Candler Bldg.,
Atlanta, Ga.

Charles W. Bergman,
of Counsel

ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged and copy received of the foregoing reply brief of Petitioner for Certiorari.

This October....., 1962.

.....

Counsel for Jackson's Atlanta
Ready Mix Concrete Company, Inc.

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Supreme Court of The United States

OCTOBER TERM, 1962

NO. 389

MRS. AGNES JUNE DILLARD,
Petitioner

vs.

JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.,
Defendant.

PETITION OF MRS. DILLARD FOR REHEARING

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Supreme Court of The United States

OCTOBER TERM, 1962

NO. 389

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vs.

JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.,
Defendant.

PETITION OF MRS. DILLARD FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Mrs. Agnes June Dillard and presents this her petition for rehearing in the above entitled cause and in support thereof respectfully shows:

This honorable court has very definitely overlooked the following material facts and controlling decisions in denying the petition for certiorari in this case, because they unquestionably require the grant of the writ of certiorari under Section 1 of the Fourteenth Amendment of the U. S. Constitution and the prior uniform decisions of this court pertaining thereto.

The record shows that in a suit for serious, painful, permanent, and disabling injuries petitioner secured a verdict and judgment on October 9, 1959, in the amount of $21,816.00 against a corporation listed in the Atlanta Telephone Directory and the Atlanta City Directory as

"Jackson Ready Mix Concrete Co., Inc.," 1000 Seaboard Ave., N. E., Atlanta, Ga. Its correct corporate name was "Jackson's Atlanta Ready Mix Concrete Company, Inc." The public record of its charter does not identify it in any way with said address.

Petitioner's suit was against said corporation and the driver of one of its cement-mixing trucks which was negligently driven through a red traffic stop light and then on the wrong side of the street and into the automobile occupied by the petitioner as an invited guest passenger.

Both defendants were duly served with the suit and process at 1000 Seaboard Ave., but neither appeared nor answered. The jury's verdict for Mrs. Dillard is based upon proof submitted by her showing the extent, severity, and permanency of her injuries. (Neither the said verdict nor the judgment based thereon has ever been set aside and both are therefore final and conclusive.) Petitioner was injured on May 28, 1959, by the defendants, and *the Georgia Statute of Limitations for this tort is two years.*

Following the entry of said verdict and judgment, the corporate defendant filed two traverses of service, an affidavit of illegality, and a motion to set aside the judgment, in all of which it designated itself as the Defendant in Fi. Fa. On May 31, 1960, the Sheriff of Fulton County, Georgia, levied upon the property of the corporate defendant to satisfy Mrs. Dillard's execution. The Sheriff made the following entry of his levy: *"The said property is levied upon as the property of Jackson's Atlanta Ready Mix Concrete Company, Inc. doing business under the assumed trade or business name of Jackson Ready Mix Concrete Co., Inc. at 1000 Seaboard Ave., N. E., Atlanta, Ga. as Defendant in fi. fa. issued from Fulton Superior Court against Jackson Ready Mix Concrete Co. Inc. et al in favor*

of Mrs. Agnes June Dillard as Plaintiff in fi. fa. Property pointed out by plaintiff's attorney."

The corporate defendant thereupon filed a *"Third-Party Claim"* to the property so levied upon, although there were still pending its two traverses, its affidavit of illegality, and its motion to set aside the judgment, in all of which it designated itself as the defendant in fi. fa. as aforesaid. After filing its "Third-Party Claim" it dismissed one of said traverses on June 20, 1960, with the following stipulation in writing: *"Jackson's Atlanta Ready Mix Concrete Company, after levy made, having filed third-party claim in the within matter, the above traverse (of the service of process upon it)* is hereby withdrawn and dismissed." Its other traverse and its affidavit of illegality and motion to set aside the judgment were never dismissed or withdrawn.

Thereafter the Defendant's claim case came on for trial before Fulton Superior Court and a jury. In addition to the foregoing stipulation and admissions in judicio of Jackson's Atlanta Ready Mix Concrete Company, Inc. that it was the Defendant in fi. fa., the evidence adduced on the trial included, among other things: 1. Claimant's stipulation that one of its employees, E. H. Lambert, had been served with the suit and process on July 27, 1959 at 1000 Seaboard Ave. (R. 47-8). The production in court and in evidence by Claimant (Jackson's Atlanta Ready Mix Concrete Company, Inc.) of the copy of the suit and process served upon its said employee, E. H. Lambert (R. 47-8 and 54). 3. Its stipulation that said copy of the suit and process was the very one served upon its said employee, E. H. Lambert (R. 47-8 and 54). 4. That its Co-defendant, Robert R. Stephens (the driver of the truck which injured petitioner), was on the payroll of Jackson's Atlanta Ready Mix Concrete Company, Inc. at the time of the collision (R. 43). 5 Admission of H. N. Jackson,

Jr., General Manager of the Defendant Corporation, that the truck which injured Mrs. Dillard was its property and that the cement-mixer thereon had been dismounted therefrom (R. 28).

Upon the completion of the evidence in the claim case of Jackson's Atlanta Ready Mix Concrete Company, Inc., Mrs. Dillard's counsel moved for a directed verdict in her behalf upon the ground that THE POSITIVE AND UNCONTRADICTED EVIDENCE AND THE SOLEMN ADMISSIONS IN JUDICIO OF SAID CLAIMANT CORPORATION SHOWED IT WAS THE SAME LEGAL ENTITY AND PARTY AS THE DEFENDANT IN FI. FA. (R. 4-5). Said motion was denied by the Court. The case was then submitted to the Jury, after argument of counsel and charge of the court, and the jury returned a verdict for Jackson's Atlanta Ready Mix Concrete Company, Inc. as Claimant (R. 5, 18).

Mrs. Dillard thereupon moved for a judgment in her behalf non obstante veredicto as provided by the law of Georgia in such cases (R. 19-30). This motion was denied and Mrs. Dillard appealed therefrom to the Court of Appeals of Georgia, which affirmed the trial court. (R. 4-12).

Mrs. Dillard filed a motion for rehearing as provided by the law of Georgia upon the ground that the decision of the Court of Appeals deprived her, a citizen of Georgia and of the United States, of her property in the amount of her verdict, judgment, and fi. fa., *wthout due process of law and without equal protection of the law, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution,* in that the law of Georgia as applied to other persons in like circumstances and similar situations provides that a judgment against a person (natural or artificial) in his or its assumed or trade name is valid and bind-

ing, and that such a person is a party to the judgment, and is not entitled to file a claim to property levied upon to satisfy the judgment (R. 68). This motion was denied with a revision of the opinion but adherance to the judgment affirming the trial court.

Plaintiff thereupon filed a petition with the Supreme Court of Georgia for a writ of certiorari to review, correct, and reverse the erroneous and unconstitutional decision of the Court of Appeals of Georgia upon the same grounds urged in Plaintiff's motion for rehearing in the latter court (R. 104). It was denied (R. 105). Plantiff also filed in the Supreme Court of Georgia a Motion for Reconsideration of the denial of her petition for certiorari to the Court of Appeals, and it was likewise denied.

Plaintiff then filed her petition to the Supreme Court of the United States for the writ of certiorari to review, correct, and reverse the decision and judgment of the Court of Appeals of Georgia of March 15, 1962 as revised on March 29, 1962 and its denial of the latter date of Petitioner's Motion for Rehearing. The said petition to this court was denied on November 13, 1962, and Petitioner now files this Petition for Rehearing.

Unless this honorable court grants the writ of certiorari in this case and reverses the Arbitrary, Capricious, Illegal, Unjust, Unconscionable, and Unconstitutional decision of the Court of Appeals of Georgia of March 15, 1962 as revised on March 29th, Petitioner will be forever barred from receiving any compensation whatever from the Defendant for the serious, painful, disabling, and permanent injuries inflicted upon her by its employee, Robert R. Stephens, on May 28, 1959, while operating its truck in its business (inasmuch as the statute of limitations as to this tort is two years), despite the fact that it was served with

suit and process by leaving a copy with its agent or manager, E. H. Lambert, at its place of business at 1000 Seaboard Ave., Atlanta, Ga., and petitioner secured upon proper proof a verdict and judgment against it in its assumed or trade name of Jackson Ready Mix Concrete Co., Inc. in the amount of $21,816.00, which is valid, final, and conclusive under the uniform decisions of the Court of Appeals and Supreme Court of Georgia applied to other persons in like circumstances and similar situations. In this connection this court has very apparently overlooked the decisions of the Court of Appeals and Supreme Court of Georgia in *Becker vs. Truitt*, 39 Ga. App. 286, 146 S.E. 654; *Becker vs. Truitt*, 170 Ga. 757, 154 S.E. 262; *Executive Committee of the Baptist Convention of Georgia vs. Smith*, 44 Ga. App. 184, 161 S.E. 143; *Eslinger vs. Herndon*, 158 Ga. 823, 124 S.E. 160; and *Smith vs. Hartrampf*, 105 Ga. App. 40, 123 S.E. 2nd 417, holding THAT A JUDGMENT RENDERED AGAINST A PERSON (NATURAL OR ARTIFICIAL) IN HIS OR ITS ASSUMED OR TRADE NAME IS NOT VOID BUT IS VALID AND BINDING, AND THAT SUCH A PERSON IS A PARTY TO THE JUDGMENT AND IS NOT ENTITLED TO FILE A CLAIM TO THE PROPERTY LEVIED UPON TO SATISFY THE JUDGMENT AND EXECUTION BASED THEREON. None of said decisions has ever been modified or reversed.

This court has apparently overlooked the case of *Florida Yellow Pine Co. et al* vs. *Flint River Naval Stores*, 140 Ga. 321, 78 S.E. 900, in which the Supreme Court of Georgia held that a party to a suit will not be allowed to disprove an admission made in his or its pleadings, without withdrawing the same from the record, and the case of *Pinkham* vs. *Gibbs*, 108 Ga. 141, 33 S.E. 945, holding that admissions in a sworn pleading are binding upon the party

making them, although he may strike them from the pleading by amendment. *In this case the admissions by the defendant* in its motion to set aside the judgment and its affidavit of illegality that it was the defendant in fi. fa: *were never dismissed or withdrawn.*

This court very apparently overlooked the decision of the Supreme Court of Georgia in *Moody and Wife* vs. *Davis,* 10 Ga. 410-12 holding: "IT IS THE DUTY OF THE JUDGE TO ENFORCE THE LAWS OF THE STATE, MADE IN ACCORDANCE WITH THE STATE AND FEDERAL CONSTITUTIONS — THE WHOLE LAW, AS IT APPLIES, IN HIS JUDGMENT, TO THE CASES WHICH COME BEFORE HIM. HE HAS NO RIGHT AND NO POWER TO WITHHOLD THE APPLICATION OF ONE SINGLE PRINCIPLE OF LAW TO A SINGLE CASE OVER WHICH HE HAS JURISDICTION; HE HAS NO DISPENSATION JUSTIFYING OR EXCUSING AN OMISSION TO APPLY THE LAW." IN THIS CASE THE RECORD SHOWS WITHOUT CONTRADICTION THAT THE COURT OF APPEALS ARBIRARILY REFUSED TO ENFORCE OR TO APPLY THE LAW TO PETITIONER WHICH WAS UNIFORMLY APPLIED TO OTHER PERSONS IN LIKE CIRCUMSTANCES AND SIMILAR SITUATIONS BY THAT COURT AND THE SUPREME COURT OF GEORGIA IN THE PARTICULARS POINTED OUT IN PETITIONER'S PETITION FOR CERTIORARI AND REPLY BRIEF. THIS CERTAINLY CONSTITUTES A DENIAL OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF SECTION I OF THE FOURTEENTH AMENDMENT and THIS FEDERAL CONSTITUTIONAL GROUND WAS PROPERLY AND TIMELY RAISED BY MOTION FOR REHEARING IN THE

COURT OF APPEALS IMMEDIATELY UPON THE RENDITION OF ITS SAID UNJUST AND UNCONSTITUTIONAL DECISION.

As shown in the cases of *State of Missouri Ex Rel. Missouri Insurance Co.* vs. *Gehner, Inc.*, 281 U.S. 313, 50 S.Ct. 326; *Brinkerhoff-Faris Trust and Saving Co.*, 281 U.S. 673, 50 S.Ct. 451; and *Dan Rogers* vs. *Ala.*, 192 U.S. 226, 24 S.Ct. 257, Petitioner was not bound to anticipate that the Court of Appeals of Georgia would fail and refuse to follow its prior and well established decisions and those of the Supreme Court of Georgia (which were binding upon it) that a judgment against a person (natural or artificial) in his or its assumed trade name is valid and binding, and that such a person is a party to the judgment and is not entitled to file a claim to property levied upon to satisfy the judgment.

As pointed out by this Court in *State of Missouri, ex rel. Gaines* vs. *Canada, et al*, 305 U.S. 357(7), 59 S.Ct. 232, 356, *The equal protection of laws* is a pledge of the *protection of equal laws*. As also stated by this court in *Hill* vs. *State of Texas*, 316 U.S. 400, 62 S.Ct. 1159: "EQUAL PROTECTION OF THE LAW IS SOMETHING MORE THAN AN ABSTRACT RIGHT. IT IS A COMMAND WHICH THE STATE MUST RESPECT—THE BENEFIT OF WHICH EVERY PERSON MAY DEMAND."

As held by this court in *Norris* vs. *Ala.*, 294 U.S. 587, 55 S.Ct. 579, Where a federal right is specially claimed in a State court (which was timely done in the case at bar), the U. S. Supreme Court must inquire whether the right was denied, not merely in express terms, but also in substance and effect, and, if necessary, evidence must be examined. As held by this court in *Malinski et al* vs. *People of State of New York*, 324 U.S. 401, 65 S.Ct. 781: "Ju-

dicial review of the guaranty of due process imposes on the Federal Supreme Court an exercise of judgment upon the whole course of proceedings to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people." Section I of the Fourteenth Amendment of the U. S. Constitution expressly provides that no State shall "deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the law."

In construing the Fourteenth Amendment of the U. S. Constitution this court held in CHAMBERS ET AL VS. STATE OF FLORIDA, 309 U.S. 227, 60 S.Ct. 472: "***ALL PEOPLE MUST STAND ON AN EQUALITY BEFORE THE BAR OF JUSTICE IN EVERY AMERICAN COURT. **** UNDER OUR CONSTITUTIONAL SYSTEM, COURTS STAND AGAINST ANY WINDS THAT BLOW AS HAVENS OF REFUGE FOR THOSE WHO MIGHT OTHERWISE SUFFER BECAUSE THEY ARE HELPLESS, WEAK, OUTNUMBERED, OR BECAUSE THEY ARE NON-CONFORMING VICTIMS OF PREJUDICE AND PUBLIC EXCITEMENT. *** NO HIGHER DUTY, NO MORE SOLEMN RESPONSIBILITY, RESTS UPON THIS COURT, THAN THAT OF TRANSLATING INTO LIVING LAW AND MAINTAINING THIS CONSTITUTIONAL SHIELD DELIBERATELY PLANNED AND INSCRIBED FOR THE BENEFIT OF EVERY HUMAN BEING SUBJECT TO OUR CONSTITUTION — OF WHATEVER RACE, CREED OR PERSUASION."

This court has very apparently overlooked its decision in the case of *U. S.* vs. *Lee*, 106 U.S. 196, 1 S.Ct. 261. To paraphrase the language of that decision, IT CANNOT BE, THEN, THAT WHEN IN A SUIT BY ONE PARTY

AGAINST ANOTHER PARTY FOR COMPENSATION FOR INJURIES NEGLIGENTLY INFLICTED UPON THE FORMER BY THE LATTER, WHEN THE INJURED PARTY HAS ESTABLISHED HER RIGHT TO COMPENSATION ACCORDING TO ALL THE FORMS OF JUDICIAL PROCEDURE, AND BY THE VERDICT OF A JURY AND A JUDGMENT OF THE COURT AGAINST THE PARTY WHICH NEGLIGENTLY HURT HER AND IN THE NAME UNDER WHICH IT WAS DOING BUSINESS AND WAS DULY AND LEGALLY SERVED, THE INJURED PARTY CAN BE ARBITRARILY AND ILLEGALLY DEPRIVED OF THE COMPENSATION AWARDED TO HER BY THE VERDICT OF THE JURY AND THE JUDGMENT OF THE COURT MEREY BECAUSE THE PARTY WHICH SERIOUSLY INJURED AND DAMAGED HER NEGLECTED TO FILE AN ANSWER TO THE SUIT AND PROCESS DULY AND LEGALLY SERVED UPON IT AND WHERE UPON RENDITION OF A VERDICT AND JUDGMENT AGAINST IT FOR THE INJURED PARTY, IT FILED TRAVERSES OF SERVICE, AND ILLEGALITY, AND MOTION TO SET ASIDE THE JUDGMENT, IN ALL OF WHICH IT ADMITTED IT WAS THE DEFENDANT IN FI. FA., BUT UPON LEVY OF THE FI. FA. UPON ITS PROPERTY TO SATISFY THE JUDGMENT, IT FILED A FALSE CLAIM AS A THIRD PARTY TO THE PROPERTY LEVIED UPON; THAT, THOUGH THE NATURE OF THE CONTROVERSY IS ONE PECULIARLY APPROPRIATE TO THE JUDICIAL FUNCTION OF THE COURT IN WHICH PETITIONER OBTAINED HER VERDICT AND JUDGMENT AFTER A FAIR AND LEGAL TRIAL. "IF SUCH BE THE LAW OF THIS COUNTRY, IT SANCTIONS A TYRANNY WHICH

HAS NO EXISTENCE IN THE MONARCHIES OF EUROPE, NOR IN ANY OTHER GOVERNMENT WHICH HAS A JUST CLAIM TO WELL-REGULATED LIBERTY AND THE PROTECTION OF PERSONAL RIGHTS."

IT WOULD APPEAR TO BE IMPOSSIBLE TO PRESENT A STRONGER CASE OF THE DENIAL OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OR ONE WHERE THIS FEDERAL QUESTION WAS RAISED MORE TIMELY OR PROPERLY THAN THIS CASE. UNLESS THIS COURT GRANTS THE WRIT OF CERTIORARI AND REVERSES THE ARBITRARY AND CAPRICIOUS DECISION OF THE COURT OF APPEALS, PETITIONER WILL BE CONDEMNED TO SPEND THE REST OF HER LIFE IN PAIN AND MISERY WITHOUT ANY COMPENSATION WHATEVER FOR HER SERIOUS INJURIES, DESPITE THE FACT THAT SHE OBTAINED A VALID AND FINAL VERDICT AND JUDGMENT THEREFOR AGAINST THE DEFENDANT IN A COURT WHICH HAD JURISDICTION TO RENDER THE SAME. IF THE STATEMENT IN SECTION I OF THE FOURTEENTH AMENDMENT OF THE U. S. CONSTITUTION THAT NO STATE SHALL "DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION, THE EQUAL PROTECTION OF THE LAW," means anything, IT VERY MANIFESTLY DEMANDS THE GRANT OF THE WRIT OF CERTIORARI AND REVERSAL OF THE UNJUST, UNCONSCIONABLE, AND UNCONSTITUTIONAL DECISION OF THE COURT OF APPEALS WITHOUT ANY EVI-

DENCE TO SUPPORT IT AND CONTRARY TO THE POSITIVE, OVERWHELMING, AND UNCONTRADICTED EVIDENCE AND SOLEMN ADMISSIONS OF THE DEFENDANT AND THE CONTROLLING LAW.

The basis of petitioner's position is best stated in the words of the late Mr. Chief Justice Stone in his appraisal of the late Mr. Associate Justice Van Devanter, as follows: *"He was profoundly aware that the true source of the strength of the Court and the permanency of its influence is public confidence in the thoroughness, integrity, and disinterestedness with which it does its work.* In his mind this signified, and rightly so, the need of unremitting study by every judge of every record and application which comes to the Court for disposition, and the free and frank exchange of views with associates as preliminaries to decision unaffected by extrinsic influences or nonjudicial considerations." *If this rule is followed in the present case, this court will undoubtedly grant the writ of certiorari and reverse the arbitrary and capricious decision of the Court of Appeals of Georgia and thereby administer to petitioner "EQUAL JUSTICE UNDER LAW,"* in accordance with the motto of this Court inscribed upon the beautiful building in which it is located, and the clear and positive language of Section I of the Fourteenth Amendment.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF COUNSEL

I, G. Seals Aiken, counsel for the above named Mrs. Agnes June Dillard, Petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

This the 6 of December, 1962.

G. Seals Aiken

G. SEALS AIKEN,
Counsel for Petitioner

ACKNOWLEDGEMENT OF SERVICE

Service is hereby acknowledged and copy received of the foregoing Petition for Rehearing.

This December_____, 1962.

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Counsel for Jackson's Atlanta Ready Mix Concrete Company, Inc., Defendant.